Electronically Filed
Docket: 16-CRB-0001-SR/PSSR (2018-2022) (Remand)
Filing Date: 05/17/2021 05:26:45 PM EDT

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (SDARS III)	Docket No. 16–CRB–0001–SR/PSSR (2018–2022) (Remand)

MUSIC CHOICE'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL

In an attempt to avoid the substance of Music Choice's motion, SoundExchange asks the Judges to enforce a fictional deadline of SoundExchange's own creation. There is nothing – and SoundExchange cites nothing – in the Judges' regulations, the Copyright Act, or the general practices observed in federal courts that requires parties to file motions to compel prior to receiving the production at issue. Such a rule would run counter to the goals of discovery and would incentivize discovery misconduct.

When it gets to the merits, SoundExchange does not come close to meeting its burden to establish privilege. Rather than describing the individual documents withheld and identifying specific bases for invoking privilege, SoundExchange attempts to change the subject to a handful of documents it did produce – none of which contain the information at issue in this Motion. Even had SoundExchange established that any of the withheld documents were initially privileged, it has failed to rebut Music Choice's clear showing that SoundExchange waived privilege by placing Mr. Stark's 2017 investigation into BDO's audits at issue.

The relevant points are beyond dispute. SoundExchange has responsive and relevant documents related to Mr. Stark's actual 2017 investigation, analysis, and evaluation of the BDO

audits. SoundExchange has not produced any of those documents. SoundExchange has not made any particularized showing that these documents would be privileged. Even if some of the documents fell within the work product doctrine when they were created, SoundExchange has placed Mr. Stark's investigation at issue in this proceeding, thus waiving any work product or other privilege. SoundExchange must produce the documents sought.

I. Music Choice's Motion is Timely

SoundExchange first argues that Music Choice's Motion to Compel is untimely based on a novel claim that the deadline for Music Choice's motion was March 31 – the date documents were to be produced under the Judges' scheduling order. *See* Opp. at 4. Notably, SoundExchange cites no precedent for its newly-invented deadline. There is nothing in the Copyright Act nor the Judges' regulations that could support SoundExchange's rule. Nor is there anything in the scheduling order that requires filing a motion to compel by the same date document production is due. To the extent federal courts impose deadlines for filing motions to compel, the deadline is keyed to the close of *all* discovery, not an earlier deadline for document production. And even then, such deadlines are not enforced if the need for making the motion was not apparent during the discovery period. *See McFadden v. Ballard, Spahr, Andrews, & Ingersoll, LLP*, 243 F.R.D. 1, 11 (D.D.C. 2007). Under the scheduling order, discovery closed on April 29, 2021. Music Choice filed the instant motion on that date. The motion is timely.

SoundExchange's fictional rule makes no sense as applied to this motion. SoundExchange does not dispute that in its responses to Music Choice's document requests, it agreed to produce the category of documents covered by this motion. SoundExchange also acknowledges that it withheld responsive documents, and pursuant to an agreement between the parties that has been in place for the entire proceeding SoundExchange did not produce a

privilege log. Based upon SoundExchange's written responses, as clarified during the meet and confer process, Music Choice had no reason to believe that SoundExchange would actually withhold the very documents it agreed to produce. And even if SoundExchange had provided a privilege log, it would not have been provided until shortly ***after*** the document production date. Endorsing SoundExchange's novel rule would make it impossible to ever move to compel production of documents improperly withheld on invalid privilege grounds.

Forcing participants to make discovery motions before documents are even produced would lead to wasteful, unnecessary motion practice. It is often difficult to evaluate whether a motion to compel is truly necessary until the receiving party sees what was actually produced. Under SoundExchange's unsupported rule, participants would have to make motions on every conceivable ground, even when the production may turn out to be sufficient and the motion unnecessary. But those motions would be inherently premature, because the Judges could not properly evaluate the motions in the context of what has actually been produced. *See Barnes v. D.C.*, 289 F.R.D. 1, 8–9 (D.D.C. 2012) (motion to compel filed while the opponent still had time to provide the requested discovery was premature).

Even SoundExchange did not believe its fictional deadline existed until it needed a way to avoid the substance of this Motion. The document request meet and confer process continued into April and SoundExchange never indicated that it believed it would need final positions prior to the March 31 production deadline. *See* Wheeler-Frothingham Decl. ¶ 4, Ex. B.

SoundExchange's claims regarding alternative ways Music Choice "could have" sought discovery are irrelevant and incorrect. Opp. at 4. SoundExchange agreed to produce the documents at issue, and during the meet and confer process confirmed that it would not limit its production based upon boilerplate written objections. *See* Wheeler-Frothingham Decl. ¶ 3, Ex. B.

SoundExchange gave Music Choice no notice that it was withholding the documents, so Music Choice had no reason to raise these specific privilege issues during the meet and confer process. It is remarkable that SoundExchange attempts to make a virtue out of the fact that it only produced 67 documents. Absent time-travel, reviewing those documents ***after*** the production date could not enable Music Choice to file a motion to compel ***before*** the production date. Moreover, review of that production could not provide notice of what documents were ***withheld*** from production.

Finally, the availability of a deposition of Mr. Stark does not justify depriving Music Choice or the Judges of key documentary evidence. The documents sought were generated during Mr. Stark's 2017 investigation of the BDO defensive audits. That investigation took place over several months, approximately four years ago. During that process, Mr. Stark was given extensive access to the BDO accountants who performed Music Choice's audits and their work papers. At the end of his investigation, Mr. Stark never identified any errors or insufficiencies to Music Choice – and SoundExchange in fact dropped its request to do its own audit of the PSS payments. *See* Decl. of Russell Potts ISO Music Choice's Opposition to Motion for Subpoena ¶¶ 4-6. Contemporaneous documents from that time will yield far more concrete, detailed information than would a deposition taken years after the fact, particularly one conducted without the documents sought in this motion. And SoundExchange cites no authority for the proposition that the availability of a deposition can justify denying a party's right to document discovery.

Finally, SoundExchange misrepresents the parties' respective goals. Opp. at 4. It is ***SoundExchange*** that seeks to deprive the Judges of a full and accurate evidentiary record. SoundExchange seeks a subpoena to have its paid forensic accountant submit a new declaration

regarding an investigation he conducted four years ago, without providing any underlying documentary evidence that could be used to test the accuracy of that new testimony. Music Choice seeks to expand that subpoena so ***more*** evidence is produced and can inform the Judges' eventual decision. In this Motion, Music Choice seeks similar documents from SoundExchange, while SoundExchange is fighting tooth and nail to keep this evidence hidden. There can be no question which party is seeking to keep relevant evidence out of the record.

II. SoundExchange Does Not Dispute that the Documents Sought are Relevant and Responsive

Nowhere does SoundExchange dispute that the documents sought are responsive and relevant. Instead, SoundExchange shifts focus to mischaracterizations of what little it *has* produced. SoundExchange claims it has produced documents "reflecting the investigation and analysis conducted by the accountants at Prager Metis with respect to Music Choice's defensive audits" (Opp. at 1) and "correspondence among Music Choice, SoundExchange, and Mr. Stark discussing the BDO defensive audits and Mr. Stark's review of some of the work papers and documents from those audits." (*See* Opp. at 5, citing Cherry Decl. ¶ 10). But not a single document produced actually contains any of the information sought in this Motion. Of the mere 67 documents SoundExchange produced on remand, over 30 comprise duplicative email chains, letters, and redlines relating to 1) the NDA between Eisner Amper (Mr. Stark's prior firm) and Music Choice for a proposed audit of its PSS and BES license payments; 2) SoundExchange's and Music Choice's respective position on defensive audits generally; or 3) correspondence in which Music Choice agreed to provide BDO's audit reports to Mr. Stark. *See* Wheeler-Frothingham Decl. ¶ 5. None of these documents contain substantive discussion of Mr. Stark's analysis or evaluation of the BDO audits. Indeed, these documents all pre-date that analysis

because they were created before Mr. Stark began his review of the BDO materials. *Id.* SoundExchange has not produced ***a single document*** containing any findings, evaluations, or analysis related to the BDO audits. *Id.*

III. SoundExchange Has Not Established That the Withheld Documents Are Privileged

Music Choice does not know whether any of the documents sought in this Motion were privileged before SoundExchange decided to place at issue Mr. Stark's 2017 investigation. It certainly did not concede that any of them were privileged as SoundExchange insinuates. *See* Opp. at 6. All Music Choice acknowledged in its moving papers is that documents of this nature may, under certain circumstances, be privileged. Music Choice was forced to file this Motion specifically ***because*** it had no way to know what the withheld documents were or to assess SoundExchange's vague privilege claim.

It is SoundExchange's burden in the first instance to demonstrate that privilege applies. *See In re Veiga*, 746 F. Supp. 2d 27, 33 (D.D.C. 2010). To meet its burden, the proponent of the claimed privilege "must offer more than just conclusory statements, generalized assertions, and unsworn averments of its counsel." *Id.* at 34. SoundExchange has not done so. Instead, it asserts vague generalities about the nature of these supposedly privileged documents. *See* Opp. at 6. These non-specific claims of privilege runs afoul of the rule that a proponent of a privilege claim may not "assert blanket or categorical claims of privilege; rather, the law 'requires a showing that the privilege applies to each communication for which it is asserted.'" *In re Veiga*, 746 F. Supp. 2d 27, 33 (D.D.C. 2010), quoting *United States v. Legal Servs. for New York City*, 249 F.3d 1077, 1082 (D.C. Cir. 2001). SoundExchange fails to make that threshold showing. On that ground alone, the Judges should grant Music Choice's Motion.

IV. SoundExchange Cannot Seek To Invoke Privilege on the Same Topic on Which It Seeks to Introduce Testimony

In its Motion to Compel, Music Choice demonstrated that even if SoundExchange could establish that the withheld documents were at one time protected by the work product doctrine or other privilege, it waived that privilege by placing Mr. Stark's 2017 investigation of the BDO audits at issue in litigation. Motion to Compel at 6-7. In an attempt to argue against waiver, SoundExchange claims it has not sought testimony about "Prager Metis's actual findings, analyses and opinions expressed to its client SoundExchange in the actual investigation." Opp. at 7. This argument is not only false, but also demonstrates why it is crucial that the Judges grant Music Choice's motion.

SoundExchange's proposed Subpoena seeks testimony specifically regarding Mr. Stark's evaluation of "[t]he Defensive Audit conducted by BDO USA, LLP ('BDO') for Music Choice and the effect of any such audit on Prager Metis CPAs' ability to conduct a royalty verification procedure intended to reflect the period from 2013 to 2016." Motion for Subpoena, Exhibit A, at 3. This was the very subject of Mr. Stark's 2017 investigation. He could not possibly have personal knowledge of this topic independent of that investigation. Indeed, the only reason SoundExchange filed its Motion for Subpoena was to circumvent the NDA Mr. Stark entered into with BDO pertaining to that investigation. Any claim that Mr. Stark's proposed testimony described in the subpoena is somehow distinct from the actual investigation Mr. Stark did in 2017 is nonsensical.

The fact that SoundExchange is arguing it does not want Mr. Stark to testify about his actual assessment and findings from 2017 demonstrates why the Judges must grant Music Choice's Motion. Unless this Motion is granted, SoundExchange intends to have Mr. Stark

create a whole new set of findings in his new testimony, solely for SoundExchange's purposes in this litigation – potentially inconsistent with what he found at the time he performed his investigation. SoundExchange should not be allowed to rig the evidentiary record this way.

In its Motion to Compel, Music Choice cited cases establishing the clear rule that a party that places a particular matter at issue in litigation waives any work product protection or other privilege that might have otherwise shielded documents directly related to that issue. Motion to Compel at 6-7. It is well established that privilege cannot be used both as a sword and a shield. *See The Navajo Nation v. Peabody Holding Co.*, 255 F.R.D. 37, 44 (D.D.C. 2009) ("'[P]rivilege cannot be used both as a sword and as a shield.' . . . As a result, a party may not claim privilege over material that they place at issue in litigation.") (cleaned up); *cf Intex Recreation Corp. v. Metalast, S.A.*, No. CIVA 01-1213 JDB, 2005 WL 5099032, at *4 (D.D.C. Mar. 2, 2005) ("Considerations of fairness require that a litigant should not be able to claim reliance on advice of counsel as a defense, and hence a sword in litigation, while at the same time asserting attorney-client privilege or work product doctrine as a shield to protect against the opposing party testing the legitimacy of that claim. . . Hence, not just the opinion letters themselves and communications with the client about them must be produced, but also those materials that counsel actually relied upon in rendering an opinion, to the extent those documents were provided to the client. . . The waiver also includes all documents that refer or relate to the subject matter addressed in counsel's opinion letter, to the extent those documents were provided to the client.") (cleaned up).

SoundExchange's attempts to distinguish the cases cited by Music Choice fail. *See* Opp. at 7. The fact pattern in *Nobles* – where a litigant sought to introduce oral testimony on a topic while resisting document disclosure on that same topic – is clearly analogous to

SoundExchange's tactic. SoundExchange cites a single district court decision to support its position. *Opp*. at 8. But its reliance is misplaced. That case involved an argument that the DOJ, by disclosing certain SEC notes in discovery in one litigation, had waived the SEC's work product privilege in a different litigation. *See Williams & Connolly LLP v. U.S. S.E.C.*, 729 F. Supp. 2d 202, 212 (D.D.C. 2010), *aff'd sub nom. Williams & Connolly v. S.E.C.*, 662 F.3d 1240 (D.C. Cir. 2011). The court's holding – that disclosure by one government agency in a different proceeding cannot waive another agency's privilege in a separate proceeding, and certainly cannot broadly waive that other agency's privilege as to subject matter not previously disclosed – is simply inapposite.

Dated: May 17, 2021 Respectfully submitted,

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Proof of Delivery

I hereby certify that on Monday, May 17, 2021, I provided a true and correct copy of the MUSIC CHOICE'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL to the following:

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Signed: /s/ Paul Fakler